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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN T. CORRODI, JR., Defendant and Appellant.	B207126 (Los Angeles County Super. Ct. No. SA060511)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Erick J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

After fraudulently inducing Jeffrey Asfour to fund a loan, defendant John T. Corrodi, Jr., was convicted of grand theft upon his negotiated plea of no contest. After entering the plea, Corrodi obtained evidence that Asfour had recorded their conversations before and after his conviction. Prior to entry of judgment, Corrodi moved to withdraw his plea and requested discovery of the recorded conversations. The trial court found that appellant failed to show good cause for the court to review his discovery request or permit him to withdraw his plea, and sentenced him according to the plea bargain. Corrodi appealed from the judgment, asserting that the trial court abused its discretion. We find no abuse of discretion, and affirm the judgment.

BACKGROUND

1. The Information

After a lengthy preliminary hearing, appellant and codefendant Grover Nix were charged by information with a violation of Penal Code section 487, subdivision (a), grand theft (count 1).[1] It was specially alleged as to count 1 that the value of the property taken exceeded $150,000. In a second count, Nix was charged with forgery.

2. The Preliminary Hearing

The evidence at the preliminary hearing consisted primarily of the testimony of victim Jeffrey Asfour and the investigating Deputy Sheriff, Detective Peter Sanzone.

a. Asfour's Testimony

Jeffrey Asfour testified that he was a retired aerospace engineer, and had been a resident of Malibu and appellant's neighbor since 1983. Appellant, a real estate broker, was considered a friend of the family.

Prior to the transaction at issue in this case, Asfour and appellant entered into an agreement whereby Asfour's family trust lent $200,000 to actor Lou Gossett. The loan was funded through escrow, secured by a trust deed, and repaid as agreed. In

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[1] All statutory references are to the Penal Code, unless otherwise stated.

March 2005, appellant proposed what he represented as a more profitable loan, for which the borrower would pay more points. Appellant told him that the $320,000 loan would be secured by a third trust deed on real estate in Agoura owned by the Oxshott Trust, for which appellant was the trustee. Appellant told Asfour that the property, a two-story house on Wagon Road (the property or the Wagon property), had sufficient equity to support a third trust deed. The borrower would pay 6 points and 15 percent interest, approximately $60,000, all payable with the principal in six months. Appellant's commission was to be half the points. Asfour agreed, and they opened an escrow.

Asfour did not read the escrow documents. He testified that he did not think the loan was risky, because there was sufficient equity in the property to support a third trust deed. Appellant told him that the first and second trust deeds totalled $1,650,000, and that the house was worth at least $2.4 million. He did not obtain an appraisal or other proof of value, relying instead on appellant's representation and his oral promise to personally guarantee the loan. Asfour did not obtain a written guarantee because, he testified, "I always assumed he was going to take care of me." He did not ask for proof of value because, he testified, "That was not the nature of our relationship. I believed him."

On April 22, 2005, while escrow was still pending, appellant telephoned Asfour and said the loan would have to be funded that day to prevent the IRS from foreclosing on the property. Appellant asked him to bring his checkbook and meet him and Grover Nix at the escrow company. Asfour had been acquainted with Nix for several years, and understood that he was the beneficiary of the borrower, Oxshott Trust, and that the property was Nix's residence. They met with escrow officer Lyssa Byrd, who refused Asfour's check, insisting on a wire transfer to fund the loan. Appellant and Nix pressured Asfour to fund the loan outside escrow, and appellant suggested they go to Asfour's nearby bank. Nix offered additional security, and handed Asfour an envelope containing an appraisal of some paintings, a "UCC-1" financing statement covering the artwork, and a grant deed for property in Redondo Beach. Nix said they needed the

money that day, and added, "Please, please, please." Asfour considered Nix's documents to be worthless and did not accept the additional security.[2] However, he yielded to the pressure and went with them to his bank, where he gave appellant a check for $320,000, payable to the Oxshott Trust, on which he wrote, "Trust deed on 29055 Wagon Road." Appellant immediately exchanged the check for a cashier's check and gave it to Nix.

Sometime later, appellant gave Asfour a recorded trust deed and title report. Appellant showed Asfour the page in the title report listing a trust deed in favor of the IRS. He circled the notation, and handwrote "removed" next to it. Appellant told Asfour that they were working on refinancing, and would repay the loan as soon as it went through. However, in September, appellant reported that they were having trouble refinancing, and would not have the money to repay him on time. This news prompted Asfour to review all the loan documents, and he noticed that the promissory note was missing. He obtained it from appellant, consulted a foreclosure company, and discovered that the property was already in foreclosure, with a foreclosure sale scheduled. Asfour attended the foreclosure sale, where he learned that a senior trust deed was in default and taxes were delinquent.

Appellant had told Asfour that the first trust deed was in good standing, but failed to tell him that a trust deed senior to Asfour's was in foreclosure at the time appellant asked him to fund the loan. Asfour explained, "My friend would never ask me to loan money on a property in default." Appellant also failed to tell Asfour that the Oxshott Trust was in bankruptcy. Asfour had never asked appellant what the status of the first or second was, or what the payments were, and did not know until he attended the foreclosure sale that the position of his trust deed was, in fact, fifth, not third.

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[2] A financing statement is ineffective without a signed security agreement. (*New West Fruit Corp. v. Coastal Berry Corp*. (1991) 1 Cal.App.4th 92, 97-98; Cal. U. Com. Code, § 9203.)

Asfour testified that he did not bid at the foreclosure sale. Instead, he lent money to a friend to buy out the third trust deed at the sale. The friend subsequently repaid the loan.

After the foreclosure sale, appellant promised he would repay Asfour once the property was refinanced. In November 2005, appellant brought him a letter agreement to repurchase the property from the successful bidder, and told Asfour that it was the only way he would ever see his money again. The letter was unsigned when appellant showed it to Asfour, but the exhibit shown to Asfour at the hearing contained a signature purporting to be his above the printed name, "Jeffrey Asfour Trustee." Asfour testified that the signature was not genuine, and that he never gave appellant or Nix permission to sign his name.

b. Detective Sanzone's Testimony

Los Angeles Deputy Sheriff Detective Peter Sanzone testified that he interviewed appellant on four separate occasions. At first, appellant told him that the reason the loan did not go through escrow was because the parties had not intended escrow to be part of the transaction. However, when Sanzone showed him the escrow instructions, appellant acknowledged his signature, and stated that he then recalled that the parties had planned for an escrow.

When Detective Sanzone asked appellant to explain the entire transaction, appellant told him he had agreed to arrange a loan for the Oxshott Trust, for which he was the trustee, in the amount of $320,000, to be used by the beneficiary, Nix, to refinance his home on Wagon Road in Agoura. Appellant said the loan was to be secured by a third trust deed on the home, and the principal was to be repaid by September of the same year, plus $60,000.

When Detective Sanzone asked appellant why Asfour was not, in fact, in third position, appellant said that this was an error caused by Nix's having forgotten that a third deed of trust had already been recorded by the seller when Nix had first bought the

property. Appellant said that the Oxshott Trust had been in bankruptcy since February 28, 2005, and he claimed to have verbally disclosed this fact to Asfour.

Although the escrow instructions reflected that Asfour was to be in third position, appellant claimed that he had verbally informed Asfour that he was not going to be in third position. Appellant admitted that he did not document the disclosure, explaining that he had intended to let the title company sort it out. Although appellant had told Detective Sanzone in an earlier interview that the loan proceeds were going to be used to refinance the Wagon property, he later told Sanzone he intended to deposit them in federal court in relation to a lawsuit unrelated to the property. When Sanzone told appellant that Asfour had said that the loan proceeds were intended to clear an IRS lien in order to facilitate refinancing the property, appellant replied that this was not true.

Appellant told Detective Sanzone that when he, Nix, and Asfour went to the escrow company, the escrow officer refused to close escrow with Asfour's check. In a later interview, however, appellant denied having gone to the escrow office at all the day the loan was funded, claiming they had gone straight to the bank. Appellant claimed that Asfour agreed to have the loan secured by the artwork, and that he was given UCC-1 financing statements. When Sanzone asked appellant why there was nothing in the escrow instructions regarding art, appellant replied, "The escrow company prepared the documents, and I don't know what your question is and I don't know what you are trying to say."

Detective Sanzone also testified regarding his interview with Nix. Nix told Sanzone that the Oxshott Trust was in Chapter 11 in order to have a lis pendens expunged from the property's title. He also said that he had deposited the loan funds with the clerk in the federal court case which gave rise to the lis pendens, in order to have the lis pendens expunged, but that the underlying federal lawsuit was unrelated to the property. Nix told Sanzone that he had intended to refinance the property in order to repay the loan.

Detective Sanzone interviewed escrow officer Lyssa Byrd in February 2006. She recalled the meeting with appellant, Nix, and Asfour on April 22, 2005, the day the

parties wanted to close escrow immediately. She was unable to close escrow that day, not only because she could not accept Asfour's personal check and immediately issue funds, but also because she had been unable to provide a clear title.

Byrd gave Detective Sanzone the preliminary title report, prepared by United Title Company. The trust deeds and lis pendens were shown on the title report as items 20 through 26. Sanzone determined that item No. 25 was a deed of trust which showed the IRS as the beneficiary, although it had been recorded against the property by appellant. Sanzone determined that the IRS does not record deeds of trust, that there was no IRS claim against the Oxshott Trust, and that the IRS had never recorded a lien against the property. The $320,000 was deposited into federal court in order to obtain the release of the lis pendens recorded by the other parties to the lawsuit -- the Galardis -- who were not in business with the Oxshott Trust. The $320,000 was ultimately paid to the IRS by the clerk of the federal court, but the payment was for the Galardis' tax liability, not the Oxshott Trust's.

3. Appellant's Plea

In November 2007, three months after the preliminary hearing, appellant entered into a plea bargain with the prosecution. Appellant pled no contest to count 1, rather than guilty, in order to avoid losing his real estate license, but did not admit the special allegation. He made immediate restitution to Rita and Jeffrey Asfour in the sum of $320,000, and agreed that there would be a restitution hearing regarding the Asfours' out-of-pocket costs. Appellant agreed that the statement he gave the police would be the factual basis for the plea.[3] The agreed disposition was to be custody limited to time served, with three years' formal probation, after which the court would reduce the

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[3] The court did not state whether the statement accepted as the factual basis consisted of a separate document, a transcript of Detective Sanzone's recorded interviews with Corrodi, or Sanzone's preliminary hearing testimony. As no statements or recordings were offered into evidence, we assume the court meant the preliminary hearing testimony.

conviction to a misdemeanor, although appellant would be permitted to apply for a reduction after one year.

4. *Dismissal of Charges Against Nix*

In December 2007, codefendant Nix filed a motion to dismiss the information, and requested an evidentiary hearing regarding his allegation of witness tampering by Asfour. Among other evidence, Nix included copies of the billing statements of Asfour's attorneys, which had been submitted in the related civil action in support of a motion for attorney fees. One statement included the time spent on February 10, 2006, for research regarding the "legality of secretly recording conversations," and for "telephone conferences with client re recordation issues." Another statement showed time spent reviewing a "recording of client conversation with Grover Nix" on October 23, 2006.

Nix also submitted appellant's declaration, dated December 11, 2007, in which appellant described two meetings he attended with Asfour, which Asfour asked him to keep secret. On November 27, 2007, Asfour told appellant that he wanted to settle "this thing." Asfour told appellant that if Nix repaid him his losses, he would reimburse appellant his out-of-pocket expenses, and use his "pull" in the district attorney's office to recommend that appellant should be "released and dismissed."

Two days later, Asfour called another secret meeting, which he videotaped. He went over the points made two days earlier, and described the prosecutor as "hot to get Nix." Appellant stated that he inferred from Asfour's comments that he wanted appellant to testify at Nix's trial that it was Nix who had represented to Asfour that the loan proceeds were needed to prevent an imminent foreclosure on the Wagon property by the IRS. In the concluding sentence of his declaration, appellant stated: "In truth, Mr. Nix knew nothing of the loan until the day of the loan. Also, neither Mr. Nix nor I told Mr. Asfour of a pending imminent foreclosure by the IRS."

Appellant joined Nix's motion to dismiss the information. The court did not grant the motion, or determine whether there was, in fact, witness tampering.[4] The trial court granted the prosecution's motion to dismiss the case against Nix pursuant to section 1385, due to issues of proof that the prosecution would have difficulty overcoming at trial.[5]

5. Appellant's Motion to Withdraw His Plea

At the time set for the restitution hearing and sentencing, the prosecution took the restitution hearing off calendar, electing not to pursue further restitution due to Asfour's secret meetings. Because the evidence in support of the motion to dismiss had suggested that Asfour may have secretly recorded his conversations with appellant, appellant requested that sentencing be continued to allow him to file a motion to withdraw the plea, and that the court order the prosecution to turn over all recordings made by Asfour of his conversations with the defendants.

The prosecuting attorney denied that he had any recordings made prior to conviction, and asked that, should he find such evidence, the court review it in camera and order the production of only relevant evidence. The court agreed to proceed with a "*Franks* type" hearing, in which the court would consider a review of the recordings in camera, if appellant first made a showing of good cause, based upon information and belief as to what transpired in his recorded conversations with Asfour, if they showed a basis for postconviction relief.[6]

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[4] Because the record on appeal does not include the court's minutes regarding the motion to dismiss, we recite these facts from the court's description of the motions and disposition, made in a later proceeding.

[5] Section 1385, subdivision (a), permits the court to dismiss an action in furtherance of justice, and for reasons set forth in its order.

[6] In *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*), the United States Supreme Court held that a criminal defendant has a limited right to challenge the veracity of a

Thereafter, in March 2008, appellant filed a written offer of proof and a motion to withdraw his plea of no contest. The offer of proof alleged that Asfour had admitted secretly recording his conversations about the loan with appellant, and that he had secretly recorded depositions in the related civil case. Appellant declined to provide information about the content of the recorded conversations, claiming that the issue presented was the existence of the recordings, not their content. However, appellant stated his belief that, in general, the content was exculpatory as to him and incriminating as to Asfour.

Although the notice of motion to withdraw the plea did not state grounds for the motion, appellant asserted in his two memoranda of points and authorities that the trial court failed to advise him prior to the making of the plea, as required by section 1192.5, that its approval of the plea bargain was not binding. Appellant also alleged that the court failed to inform him that it could withdraw its approval of the agreement at the time of sentencing, and that if the court withdrew its approval, he would be permitted to withdraw his plea.[7] Appellant also alleged his discovery of the existence of Asfour's secret recordings. Appellant urged that the very existence of the recordings, without regard to their contents, would prove that Asfour's preliminary hearing testimony was false, and that his own was true.

The prosecution turned over to the court several compact discs and a videotape, for the court to review and determine whether they should be turned over to appellant. The recordings consisted of the videotape made with appellant's knowledge after the plea, more than six voice messages from appellant recorded from Asfour's voice mail, and a recorded conversation between Asfour and Nix. The court listened to the recordings in camera, and held that the prosecution was not required to turn them over to

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facially valid search warrant affidavit, and outlined the requirements of an offer of proof necessary to obtain an evidentiary hearing.

[7] Appellant does not renew this contention on appeal.

appellant. The court also rejected appellant's claim that the factual basis was insufficient. The court denied the motion and sentenced appellant as set forth in the plea bargain.

DISCUSSION

1. *Contentions on Appeal*

Appellant contends that the denial of his motion to withdraw his plea was the result of "misinformation of fact." This misinformation of fact, appellant argues, gave the court the erroneous impression that he had been charged with multiple counts and that one was dismissed as part of the plea bargain, as well as the erroneous impression that he was more culpable than Nix. Further, arguing that his statement to the police established that he committed no fraud, appellant contends that the court erred in finding that the statement contained a sufficient factual basis for his plea.

Appellant also contends that the trial court misapplied the law, arguing that the law required the court to grant the motion due to newly discovered information -- Asfour's secret recordings. He contends that the court erred in ruling that the recordings would merely allow impeachment on a collateral issue, and therefore insufficient cause to permit him to withdraw his plea.

In his final assignment of error, appellant contends that he was denied due process by the trial court's refusal to conduct a full evidentiary hearing pursuant to his offer of proof, or turn over the recordings, and by its failure to transcribe the in camera proceedings or preserve the recordings for appellate review.

2. *Standard of Review*

"On application of the defendant at any time before judgment . . . , the court may . . . , for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (§ 1018.) "'When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.]'" (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146 (*Weaver*.)

To establish good cause, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor sufficient to overcome the exercise of his or her free judgment. (*Weaver*, *supra*, 118 Cal.App.4th at pp. 145-146.) "'"[T]he withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty."' [Citations.]" (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1507 (*Ramirez*).) It is the defendant's burden to establish by clear and convincing evidence that the ends of justice would be subserved by permitting a change of plea. (*Weaver*, at p. 146.)

Finality should be encouraged, and guilty or nolo contendere pleas entered under a plea bargain should not be set aside lightly. (*Weaver*, *supra*, 118 Cal.App.4th at pp. 145-146.) The trial court's decision will be upheld unless there is a clear showing of abuse of discretion. (*Ibid*.)

Similarly, we review the trial court's decision whether to convene an in camera examination and its discovery orders for abuse of discretion. (*People v. Luttenberger* (1990) 50 Cal.3d 1, 21, 24 (*Luttenberger*).) No abuse of discretion will be found, unless the court has acted in an arbitrary, capricious or patently absurd manner, resulting in a manifest miscarriage of justice. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

3. *Erroneous Impressions*

Appellant contends that when the trial court accepted his no contest plea, it was under the erroneous impression that he had been charged with multiple counts, and that one was dismissed as part of the plea bargain, when, in fact, it was Nix who had been accused of two felonies. In addition, appellant contends, the court was under the erroneous impression that he was more culpable than Nix. Respondent notes that

appellant failed to inform the trial court that it was under an erroneous impression regarding multiple counts and which defendant was more culpable.

Ordinarily, an appellate court will not consider a claim of error raised for the first time on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590 (*Saunders*).) It is unfair to both the trial court and adverse party to take advantage of an error that could easily have been corrected or avoided in the trial court had it been timely raised. (*Id*. at p. 590.) "'[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46 (*French*).) The forfeiture rule is especially applicable here. A court cannot abuse its discretion by failing to exercise it in a manner never requested. (See *People v. Spirlin* (2000) 81 Cal.App.4th 119, 128 (*Spirlin*).)

In any event, assuming for discussion that the trial court was under the impression that Nix was less culpable than appellant, appellant fails to show why a different impression would have supported the withdrawal of his plea. It is the defendant's burden in the trial court to establish good cause to withdraw a guilty plea by clear and convincing evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) On appeal, he must demonstrate that he was prejudiced by the denial of his motion. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.) Appellant has met neither burden.

Moreover, appellant fails show that, if the court indeed thought that appellant was more culpable, its impression was mistaken. In fact, in appellant's own declaration, filed under penalty of perjury in support of the motion to dismiss the information, he stated that Nix knew nothing about the loan until the day it was funded, and he did not tell Asfour that the money was needed to prevent a foreclosure by the IRS.

Further, the trial court was not under the impression, at the time it took the plea, that appellant had been named in more than one count. It was later, during the hearing on appellant's motion to change his plea, that the court said, "Look, Mr. Corrodi, accepted a plea bargain in exchange for a number of counts being dismissed." Even then, it was not

a "finding," as appellant describes it, but rather part of the court's comment to the effect that if Asfour lied, appellant knew it at the time he entered into his plea bargain. If the comment was a finding at all, it was a finding that appellant's preplea conversations with Asfour were not new evidence.

4. *Factual Basis*

In his motion and at the hearing on the motion, appellant argued that the plea was defective because the prosecution's specific reasons for recommending the plea bargain were not stated for the record, as required by section 1192.6, subdivision (c).[8] Appellant argued that section 1192.6 required the prosecution to articulate facts justifying a reduction of the charge from a felony to a misdemeanor. The court found section 1192.6 inapplicable, and correctly rejected the argument. (See *People v. Gonzales* (1986) 188 Cal.App.3d 586, 590 (*Gonzales*).)[9]

Appellant now contends that there was an insufficient factual basis suggesting guilt, due to the court's reliance on his statement to the police, which appellant characterizes as showing that he made full disclosure to Asfour regarding the risks of the loan, and that he made no misrepresentations. Relying on *People v. Campos* (1935) 3 Cal.2d 15, 18-19 (*Campos*), appellant contends that the trial court was required to find that there was no factual basis for the plea, because the prosecution did not file counter-declarations to show otherwise.[10] However, because appellant did not base his motion on

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[8] At the hearing on the motion, after defense counsel argued that the court failed to ascertain a "factual basis," and used that term interchangeably with "factual reason," the trial court asked counsel to explain what he meant by "factual basis." Counsel replied that he meant that the court must articulate a reason for approving a plea bargain which involves a reduction in sentence.

[9] Because section 1192.6 was intended by the Legislature to protect the public interest, individual defendants do not have standing to assert the omission of the reasons as error. (*Gonzales*, *supra*, 188 Cal.App.3d at p. 590.)

[10] In *Campos*, the defendant sought to withdraw his guilty plea, based upon evidence of the prosecution's false promise to the defendant that he would be given life

the allegation that his statement established his innocence, there was no reason for the prosecution to refute it. As appellant did not adequately raise the issue below, the prosecution cannot be faulted for not having responded to it. (See *Saunders*, *supra*, 5 Cal.4th at p. 590.) Nor can the trial court have abused its discretion in not considering the issue. (See *Spirlin*, *supra*, 81 Cal.App.4th at p. 128.)

In any event, we do not agree that appellant's statements to the police established his innocence. Appellant told Detective Sanzone at first that no escrow was contemplated, and he denied going to the escrow company with Nix and Asfour. However, he changed his statement when Sanzone showed him the escrow instructions containing his signature. Appellant told Sanzone that the loan was to be used by Nix to refinance his home on Wagon Road in Agoura, and denied that it was intended to retire an IRS lien. However, the loan was not used for either purpose. The title was subject to a trust deed ostensibly in favor of the IRS, but apparently recorded by appellant. Appellant told Sanzone that the parties intended the security for the loan to be artwork, covered by UCC-1 financing statements, but he was evasive about why the art was not mentioned in the escrow instructions. Appellant claimed that he verbally informed Asfour that his security would not be in third position and that the property was part of a bankruptcy estate, but he admitted that he never documented these disclosures.

Any failure to articulate a sufficient factual basis is harmless where the record before the court taking the plea provided a sufficient factual basis. (*People v. Watts* (1977) 67 Cal.App.3d 173, 180-181.) A factual basis is adequate if it contains sufficient information to corroborate the defendant's admission of guilt by entering the plea; it need not consist of admissible evidence establishing guilt. (*Id*. at p. 179.) Here, appellant pled no contest to grand theft, an offense which may be established with evidence that the defendant knowingly made a false representation with the intent to deprive another of his

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imprisonment instead of the death penalty, if he pled guilty. (See *Campos*, *supra*, 3 Cal.2d at pp. 16-17.) The appellate court reversed the order denying relief, because the prosecution submitted no evidence to the contrary. (*Id*. at pp. 18-19.)

property, and that the owner of the property was deceived and parted with it in reliance on the misrepresentations. (*People v. Brady* (1969) 275 Cal.App.2d 984, 996.) Intent and knowledge may be inferred from evidence establishing the remaining elements. (*Ibid.*) Appellant's no contest plea constituted an admission to all such elements. (See *French*, *supra*, 43 Cal.4th at p. 49.)

The evidence corroborating appellant's admission was before the court that took his plea, because the same judge had previously heard a section 995 motion, for which he had necessarily reviewed the preliminary hearing transcript. (See *People v. Scott* (1944) 24 Cal.2d 774, 777.)[11] The court was therefore familiar with Asfour's testimony. Asfour testified that appellant had represented that the IRS would foreclose on the property unless Asfour immediately funded the loan, and later represented that the (nonexistent) IRS lien had been removed. Asfour also testified that appellant had represented that his trust deed would be in third position, when, in fact, it was in fifth. Appellant failed to disclose, prior to the funding of the loan, that a senior trust deed was in default, taxes were delinquent, and the Oxshott Trust was in bankruptcy. Asfour testified that he believed and trusted appellant, and agreed to fund the loan outside escrow because he believed the IRS was about to foreclose.

We conclude that the preliminary hearing testimony was sufficient to corroborate appellant's admission of grand theft, and, thus, that there was an ample factual basis before the trial court at the time it took appellant's plea.

5. *Secret Recordings*

Appellant contends that the trial court should have granted his motion to withdraw his plea, because newly discovered evidence showed that Asfour may have recorded all his conversations with him. Appellant contends that the court failed to consider authorities such as *Ramirez*, *supra*, 141 Cal.App.4th 1501 and *People v. Dena* (1972) 25 Cal.App.3d 1001 (*Dena*), which held that the defendants should have been permitted

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[11] Section 995 requires the court to set aside an indictment or information filed without reasonable or probable cause.

to withdraw their pleas based upon information discovered after their pleas. Appellant contends that the discovery of the secret recordings, although not entirely exonerating, was tantamount to a recantation of Asfour's preliminary hearing testimony, and would be sufficient to destroy his credibility. Both cases are distinguishable.

In *Ramirez*, defense counsel discovered a previously undisclosed supplemental police report after the defendant pleaded no contest to armed robbery and evading arrest in exchange for the dismissal of carjacking and unlawful driving charges. (*Ramirez*, *supra*, 141 Cal.App.4th at pp. 1503-1504.) The previously undisclosed police report contained witness statements indicating that the defendant was not present during the carjacking, and had been an unwilling passenger during the later police chase. (*Id*. at pp. 1504-1505.) We held that the "state's suppression of favorable evidence is an extrinsic cause which may overcome the exercise of free judgment." (*Id*. at p. 1506, citing *Dena*, *supra*, 25 Cal.App.3d at p. 1009.) Because the prosecution had ample time prior to the plea to turn over the report, but failed to do so, the defendant established good cause to withdraw his plea. (*Ramirez*, at p. 1507.)

Similarly, in *Dena*, the prosecution withheld the official record of a blood test showing the time of the blood draw, essential to the defense of diminished capacity based upon intoxication. (*Dena*, *supra*, 25 Cal.App.3d at pp. 1005-1006.) The evidence was located after the defendant had pled guilty. (*Id*. at p. 1006.) Reversing the denial of the defendant's motion to withdraw his plea, the appellate court held that the defendant's uncontroverted affidavits were sufficient to show good cause, and the trial court was not free to disregard them. (*Id*. at pp. 1011-1012.)

There was no evidence here that the recordings were in the hands of law enforcement prior to appellant's plea, as in *Ramirez* and *Dena*. In his declaration filed in support of the motion to withdraw his plea, appellant stated that Asfour told appellant on November 27, 2007, nearly three weeks after the plea, that he had turned secretly recorded conversations over to law enforcement. Further, appellant made no showing that, as in *Dena*, the newly discovered evidence was relevant to a possible defense. (See

Dena, *supra*, 25 Cal.App.3d at p. 1009.) Nor did appellant show, as in *Ramirez*, that the newly discovered evidence identified new defense witnesses or a possible new defense, "thereby casting the case against him in an entirely different light." (*Ramirez*, *supra*, 141 Cal.App.4th at p. 1508.)

Appellant contends that the recordings would exonerate him "[*i*]*f* appellant made full disclosure of the terms of the loan and the status of the property. . . ." (Italics added.) He submitted no evidence of any conversation with Asfour in which he might have made such disclosures and which might have been recorded. The only relevance of the recordings demonstrated by appellant was that, because Asfour was the only witness to the crime and the secret recordings exposed him to criminal prosecution, Asfour's credibility would be "totally destroyed." Appellant argued, in effect, that they would be useful as impeachment. (See generally Evid. Code, § 780.)

Appellant does not deny that the value of the evidence would be to impeach Asfour's credibility, but challenges the trial court's finding that the recordings would do no more than permit impeachment of Asfour on a *collateral* matter. He claims that the impeachment of the sole witness to a crime cannot constitute impeachment on a collateral issue, but the authorities cited by appellant do not enunciate such a rule. (See, i.e., *People v. Sweeney* (1960) 55 Cal.2d 27, 41 [hearsay admissible for impeachment]; *Barkly v. Copeland* (1890) 86 Cal. 483, 486-487 [impeachment is collateral if it proves only lack of credibility, without tending to prove or disprove a relevant issue].)

Unlawful electronic eavesdropping on a confidential communication is a crime, punishable as a misdemeanor or felony, depending on the facts of the case. (§ 632.) In general, telephone conversations recorded in violation of section 632 are admissible only to impeach inconsistent testimony given by the party seeking to exclude the evidence. (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1497.) Impeachment is collateral if it concerns a matter would not be admissible independently of the impeachment. (See 3 Witkin, Cal. Evidence (4th ed 2000) Presentation at Trial, § 341, p. 426.) Thus, because appellant did not show that the recordings would tend prove any relevant issue

independently of impeachment, the trial court was correct in finding that appellant's request to withdraw his plea was based merely upon evidence that would impeach Asfour's credibility on a collateral matter. It is well within the court's discretion to deny disclosure of information obtained in violation of public policy, particularly when the information is not directly related to the issue of a defendant's guilt or innocence. (See *Luttenberger, supra,* 50 Cal.3d at p. 21.) Thus, evidence that merely provides impeachment on a collateral issue does not cast "the case against him in an entirely different light." (*Ramirez, supra,* 141 Cal.App.4th at p. 1508.)[12]

Further, appellant did not meet his evidentiary burden to show that his ignorance of the recordings was sufficient to overcome the exercise of his free judgment, or that the ends of justice would be subserved by permitting a change of plea. (*Weaver, supra,* 118 Cal.App.4th at pp. 145-146.) He merely asserts the discovery of circumstances that would improve his chances at trial, which is insufficient. (*People v. Caruso* (1959) 174 Cal.App.2d 624, 642.) Accordingly, we conclude that the trial court thus did not act arbitrarily or capriciously in denying this motion, and appellant has shown no abuse of its discretion.

7. *Evidentiary Hearing and Discovery of the Secret Recordings*

Prior to the filing of his motion to withdraw his plea, the trial court informed appellant that it would consider an in camera review of the recordings if appellant first provided a basis for postconviction relief. Appellant did not object to the proceeding,

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12 Appellant speculates that the court's real, but undisclosed, reason for having dismissed the charges against Nix was the evidence of witness tampering presented in support of the motion to dismiss the information. He suggests that the recordings would support his own motion to dismiss, because they would show that Asfour told him that if Nix paid him $1 million, he would use his influence to have the case against appellant dismissed. We decline to speculate or to reach appellant's suggestion for two reasons. First, the trial court made it very clear that the basis of Nix's dismissal was not witness tampering, but the prosecution's weak case against him. Second, there is no mention of $1 million in appellant's declarations. Appellant merely cites argument in his memorandum of points and authorities in support of his motion to withdraw plea. Argument is not evidence. (*People v. Breaux* (1991) 1 Cal.4th 281, 313.)

which the court described as a "*Franks* type of thing," and he submitted an offer of proof which would show that the recordings existed, based upon the proposed testimony of several witnesses. However, at the hearing on the motion, without obtaining a ruling on the sufficiency of appellant's showing, the prosecution voluntarily submitted the recordings for an in camera review. Finding no exculpatory information, the court concluded that appellant had not shown good cause to withdraw his plea and denied the motion.

Appellant contends that the trial court violated his due process rights by refusing to conduct a full evidentiary hearing, in order to determine the existence of additional recordings. Appellant contends that, through the testimony of the witnesses named in his offer of proof, he would have shown the existence of 10 to 15 recordings which had not been produced by the prosecution. When proceeding as in *Franks*, *supra*, 438 U.S. 154, the offer of proof must be supported by affidavits or declarations, or a satisfactory explanation was to why this is not possible. (*People v. Brown* (1989) 207 Cal.App.3d 1541, 1547.) Appellant failed to do either. In the offer of proof, defense counsel merely argued that Asfour had admitted to the existence of 10 to 15 recordings, without providing his declaration to that effect or naming a witness who would so testify. Because appellant was a party to his conversations with Asfour, he could have included his own declaration in support of his offer of proof, attesting to conversations that conflicted with Asfour's testimony, but he did not.

After a *Franks* hearing or the resolution of analogous issues, the appellant bears the burden to show that the trial court abused its discretion in rejecting the offer of proof. (See *Luttenberger*, *supra*, 50 Cal.3d at pp. 21-22.) Here, appellant failed to meet that burden. He did not provide evidence of Asfour's alleged admission of the existence of the recordings, and he failed to describe any exonerating evidence to be found in his conversations with Asfour, although the circumstances showed that such evidence was available from appellant himself. Thus, the trial court acted well within its discretion to

preclude what may have been no more than a "fishing expedition." (Cf. *id*. at p. 20 [discovery of police files].)

Appellant also challenges the propriety of having an in camera hearing at all, because this case did not involve a challenge to a search warrant affidavit as in *Franks*, *supra*, 438 U.S. 154, and because the prosecution did not claim a privilege or provide written notice of the hearing.[13] We reject appellant's challenge to trial court proceedings to which he had agreed more than one month earlier in open court, and then again by submitting an offer of proof on the day of the hearing on his motion. A party may not acquiesce in a procedure in the trial court, and then assert it as error on appeal. (See *People v. Benavides* (2005) 35 Cal.4th 69, 88 [jury selection].)

In any event, it is appellant's burden to demonstrate that that the procedure followed by the court prejudiced him. (See Cal. Const., art. VI, § 13; *People v Sewell* (1978) 20 Cal.3d 639, 646.) Any error in denying discovery is reviewed under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. Appellant has made no prejudice argument, and we discern no probability that appellant would have obtained a more favorable outcome under these facts, as he failed to show good cause, not only for an in camera review, but also for discovery of the recordings.

Appellant contends that preservation of the recordings or a transcript for appellate review was required under *People v. Mooc* (2001) 26 Cal.4th 1216, in which the California Supreme Court reviewed the denial of *pretrial* discovery of police personnel files after an in camera review. Appellant has cited no authority that would require preservation of materials which were the subject of a *postconviction* motion for an in camera review, where the defendant has not shown good cause for either the in camera review or the discovery of the materials.

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13 In camera reviews are not limited to search warrant issues, but may be conducted in the court's discretion whenever material sought to be discovered might be privileged or confidential. (*People v. Webb* (1993) 6 Cal.4th 494, 518.)

Appellant invokes the prosecutor's obligation to disclose material exculpatory evidence, but that obligation is one that exists *prior* to conviction. (*Brady v. Maryland* (1963) 373 U.S. 83; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) Only those defendants sentenced to death or life in prison without the possibility of parole have a right to postconviction discovery, when relevant to the preparation of a petition for writ of habeas corpus or a motion to vacate the judgment. (§ 1054.9, subd. (a); *In re Steele* (2004) 32 Cal.4th 682, 691.) Discovery is available to other defendants only once an order to show cause has issued. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; cf. *In re Scott* (2003) 29 Cal.4th 783, 813-814.) Thus, as appellant failed to show good cause to withdraw his plea, he stood convicted and was not entitled to discovery. As our review of the recordings would not change that, we decline to formulate a rule requiring preservation of postconviction evidence that is not subject to discovery.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAUER, J.*

We concur:

RUBIN, ACTING P. J. FLIER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.